REQUEST UNDER THE FREEDOM OF INFORMATION ACT

October 3, 2013

National Freedom of Information Office
U.S. EPA
FOIA and Privacy Branch
1200 Pennsylvania Avenue, N.W. (2822T)
Washington, DC 20460

RE: FOIA Request – Certain Agency Records: Gina McCarthy Text Messages sent or received from August 1, 2013 to the date EPA processes this request, and certain billing pages for Ms. McCarthy's EPA-provided account(s)/devices

BY ELECTRONIC MAIL: hq.foia@epa.gov

National Freedom of Information Officer,

On behalf of the Competitive Enterprise Institute (CEI), please consider this request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq*. CEI is a non-profit public policy institute organized under section 501(c)3 of the tax code and with research, investigative journalism and publication functions, as well as a transparency initiative seeking public records relating to environmental and energy policy and how policymakers use public resources, all of which include broad dissemination of public information obtained under open records and freedom of information laws.

Please provide us, within twenty working days,[1] **1)** copies of all text messages[2] sent or received by then-Assistant Administrator for Air and Radiation and now-Administrator Gina McCarthy on a mobile telephone or personal data assistant/personal digital assistant (PDA) provided for her use by the Agency, from August 1, 2013 to the date you process this request; and **2)** copies of the relevant page(s) of the monthly bills/invoices associated with Ms. McCarthy's account(s)/device(s) indicating her texting activity during all billing periods encompassing the period from August 1, 2013 to the date you process this request (exemplar attached).

Ms. McCarthy was previously assigned account with the number 202.596.0247, but we are not aware whether with the change of her position EPA has assigned her a new or additional device/number.

This request seeks text messages sent or received, and the applicable billing pages reflecting texting activity, from the date that EPA first acknowledged to CEI (through counsel at the Department of Justice) an awareness that Ms. McCarthy had the capability to delete and was

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[1] *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013), and discussion at page 26, *infra*.

[2] "Text messages" includes SMS or MMS messages, all electronic messages between two or more mobile phones or fixed or portable devices over a phone network that are not sent from an email client. In the event one or more of Ms. McCarthy's handheld devices for telephone/data use is an Apple device, this request also contemplates iMessages. In the event the or one of these handheld devices is a Blackberry device, which sends not only SMS messages, but Blackberry PINs and messages on the Blackberry Messaging service (BBM)(PINs and BBMs being slightly distinct from text messages in that they are proprietary to Blackberry--like iMessage on Apple devices--but otherwise are functionally the same as SMS), this request contemplates those messages. Regarding the latter, we note that although it is popularly assumed that no record is kept of PINs and BBMs, this is not necessarily true because the Blackberry Enterprise Server tracks those. Regardless, EPA is required to obtain, maintain and preserve all such EPA-related messages in accordance with federal record-keeping and disclosure laws.

in fact deleting correspondence on this alternative to email provided solely for official business.[3] EPA subsequently affirmed that Ms. McCarthy was deleting all such correspondence,[4] and that its system also was not maintaining any record of the correspondence for example metadata to confirm the numbers corresponded with (in the event, *e.g.*, that an official claimed that every text message among thousands upon thousands of correspondence, on an Agency resource provided solely for work purposes, were in fact solely personal, also asserting that this entitled the official to destroy the correspondence. This is EPA's and Ms. McCarthy's extant position, an assertion with which we disagree, and are requesting a court adjudicate by enjoining such practices and inquiring into how they came to be adopted, *CEI v. EPA,* D.D.C. CV: 13-1532, filed today).[5]

Responsive records will inform the public whether EPA altered the described practice of destroying a class of correspondence once that practice became undeniable. We note that there is no other information available about this, or whether, *e.g.*, EPA informed the National Archivist

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[3] *See* Email from Michelle Lo, Department of Justice counsel for EPA, to Chris Horner and Hans Bader, counsel for CEI, at 8/1/2013 7:25 PM (conceding that "Ms. McCarthy used the texting function on her EPA phone," and that "none of her texts over the period encompassing the 18 specific dates at issue in CEI's FOIA request (July 9, 2009, to June 29, 2012) were preserved"). This involved FOIA request EPA-HQ-2012- and CEI v. EPA, CV:.

[4] *See* Email from Michelle Lo to Chris Horner and Hans Bader, counsel for CEI, at 9/9/2013 3:46 PM (admitting that "Ms. McCarthy uses text messaging," but arguing that "they were not required to be preserved by the Agency." This involved FOIA request EPA-HQ-2013-006005 and *Competitive Enterprise Institute v. Environmental Protection Agency,* D.D.C. No. 13-779.

[5] *See* Email from DoJ counsel for EPA Mark Nebeker to Chris Horner, counsel for CEI, copying Cindy Anderson of EPA OGC, at 9/12/2013 1:54 PM (admitting that "Although phone calls are delineated by each number called and the airtime and charges, that is not true for text messages. It is my understanding the Agency does not receive a record from Verizon (or, in this case, its predecessor, AT&T) of individual text messages made by its employees, including Ms. McCarthy. ") This involved FOIA request HQ-2013-006937 and *Competitive Enterprise Institute v. Environmental Protection Agency,* D.D.C., CV: 13-1074. In a subsequent email Ms. Anderson asserted that with AT&T certain metadata was in fact preserved, from April 2011 to November 2011. *See* Email from Cindy Anderson to Chris Horner, September 17, 2013 9:17 AM.

when it learned of this practice as required by law.[6] This request therefore seeks to determine EPA's actions to comply with law and policy that are knowingly being violated, including but not limited to the Freedom of Information Act and the Federal Records Act ("FRA").[7]

Further Relevant Information Regarding this Records Request

These text messages constitute Agency records, and are information that EPA informs employees is in fact covered by FOIA.[8] Text messaging correspondence must be maintained and produced as records, pursuant to the Federal Records Act and FOIA. *See*, *e.g.*, National Archives, *Frequently Asked Questions About Instant Messaging*, http://www.archives.gov/records-mgmt/initiatives/im-faq.html (Instant Messaging (IM) content can "qualify as a Federal Record," since IM "allows users" to "exchange text messages," which are "machine readable materials" and

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[6] 44 U.S.C. § 3106.

[7] *See* 44 U.S.C. §§ 2101 *et seq.*, 2901 *et seq.*, 3101 *et seq.*, 3301 *et seq*.

[8] "**What kind of records might I have on my Mobile Device?**
Common Agency records maintained on Mobile Devices include e-mail, calendars, voice mail and any other information related to your work at EPA.
What should I do with Agency records created on my Mobile Device?
Records created on your Mobile Device should be transferred to your office's recordkeeping system on a regular basis. This may be done automatically or manually. A recordkeeping system may be either electronic or hard-copy, as long as records are organized and accessible. ...
Is the information on my Mobile Device subject to FOIA, subpoena, and discovery?
Yes, information on your Mobile Device may be requested under FOIA or in response to litigation. The same exemptions apply to the release of the information that apply to all other EPA records.
My Mobile Device was not provided by the Agency. Do these rules still apply to me?
Yes, if you have Agency records on a personally-owned Mobile Device, they still need to be captured in an approved recordkeeping system." (emphases in original) Frequent Questions about Mobile and Portable Devices, and Records, http://www.epa.gov/records/faqs/pda.htm.
A sufficient search of the device(s) and account(s) is one conducted by someone other than Ms. McCarthy or, at minimum, supervised. A "no records" response would require an affidavit authenticating the search and Ms. McCarthy declaring the underlying claim that she did not use any such device on the dates at issue in this request at any time for EPA related correspondence.

thus within the "statutory definition of records"); *Frequent Questions about E-Mail and Records*, http://www.epa.gov/records/faqs/email.htm; *Frequent Questions about Mobile and Portable Devices, and Records*, www.epa.gov/records/faqs/pda.htm; *Memo to All Staff, "Transparency at EPA,"* by Acting Administrator Bob Perciasepe, dated April 8, 2013 ("the Inspector General currently is conducting an audit of the agency's records management practices and procedures. We have suggested they place focus on electronic records including email and instant messaging. While we have made progress in these areas, we are committed to addressing any concerns or weaknesses that are identified in this audit . . . to strengthen our records management system").[9]

Administrator/Assistant Administrator McCarthy had a duty under the Federal Records Act not to destroy text messages, and to take remedial action once such destruction occurred. For example, under the FRA, each agency head

> shall notify the Archivist [the head of the National Archives and Records Administration] of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency of which he is the head that shall come to his attention, and with the assistance of the Archivist shall initiate action through the Attorney General for the recovery of records he knows or has reason to believe have been unlawfully removed from his agency, or from another Federal agency whose records have been transferred to his legal custody.[10]

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[9] *See also* April 11, 2008 memorandum from John B. Ellis, EPA, to Paul Wester, National Archives and Records Administration, at 4 (reporting discovery of record-keeping problems) available at http://epw.senate.gov/public/_files/2008_EPA_Archives_Memo_HILITED.pdf; *see also Records and ECMS Briefing, EPA Incoming Political Appointees 2009,* http://www.epw.senate.gov/public/ index.cfm?FuseAction=Files.View&FileStore_id=60afa4b3-3e5d-4e6f-b81e-64998f0d3c67.

[10] 44 U.S.C. § 3106.

In the past EPA has responded to learning of a senior official's wholesale destruction of electronic records by informing the Archivist, in the past.[11]

However, there is no evidence that McCarthy or EPA responded to the revelation of these violations in any way other than by defending them as proper,[12] despite having the duty to do so in both of her capacities at times relevant to this request (indeed, according to EPA she is the official who destroyed her own correspondence). There is no evidence the Archivist has ever been notified of the destruction or loss of the records. Nor has EPA taken other remedial actions, as required to comply with its duty under the FRA to "establish safeguards against the removal or loss of records he determines to be necessary and required by regulations of the Archivist"[13] and "make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency...."[14]

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[11] *See* April 11, 2008 Ellis memo, United States EPA, to Paul Wester, Director, Modern Records Program, NARA, at 1-3.

[12] *See* September 18, 2013 letter from Eric E. Wachter, Director, EPA Office of the Executive Secretariat, to Christopher C. Horner, at 1 ("no records exist" responsive to request HQ-2013-009235 for "copies of all EPA-related text messages sent and/or received by Lisa P. Jackson on May 27, 2010"; agency claims that "not all documents created by government employees are subject to preservation under the Federal Records Act. As with all electronic communication, EPA employees are required to determine whether text messages are record material and to preserve as appropriate. The text messages described in the example your provide certainly suggest unrecord material not subject to the Federal Records Act."). *See also* email from Michelle Lo, counsel for EPA, to Chris Horner and Hans Bader, counsel for CEI, at 9/9/2013 3:46 PM (admitting that "Ms. McCarthy uses text messaging," but arguing that "they were not required to be preserved by the Agency.")

[13] Id. § 3105.

[14] 44 U.S.C. § 3101.

On the basis of the above-cited authorities requiring notice and remedial actions, on its face it does seem that a 'no records' claim to this request would not on its face be credible, and would be non-responsive.

Background to the Public Interest in Requested Records

We are interested in EPA's compliance with its legal obligation to maintain and preserve text messages sent or received on Agency devices, provided for the performance of Agency duties, as federal records and Agency records. For reasons already stated, text message correspondence, like email and the other alternative to email EPA provides its employees, instant messages, are unquestionably records, about which there is at present no information indicating are managed by EPA as federal records and/or as "records" under FOIA. Indeed, it is our understanding including by information, and belief, that EPA is not producing text message transcripts or discussions in response to FOIA or congressional oversight requests for "records" or "electronic records".

Regardless, officials are not permitted to simply destroy a class of records, regardless of what medium of communication it applies to. "While the agency undoubtedly does have some discretion to decide if a particular document satisfies the statutory definition of a record," the Federal Records Act does not "allow the agency by fiat to declare 'inappropriate for preservation' an entire set of" electronic or "email documents" generated by high-ranking officials like Gina McCarthy over a multi-year period.[15]

Further, we have now demonstrated that Ms. McCarthy was remarkably active with text messaging on her EPA account/device provided solely for official purposes (CEI demonstrated

[15] *See Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1283 (D.C. Cir. 1993).

this by documents obtained under another FOIA request, EPA-HQ-2013-006937, which documents are certain information derived by EPA from its billing records reflecting Ms. McCarthy's texting activity on her EPA-issued phone). This activity includes, we have it on information and belief, texting in ways that caused internal concern and caution to Ms. McCarthy. However, EPA has to date informed CEI that it has no text messages from any period for which CEI has requested them. We seek to learn if that changed once EPA learned of the practice of wholesale destruction of text correspondence.

We seek to illustrate for the taxpayer how EPA responded to learning, or at minimum acknowledging, wholesale destruction of a class of correspondence, on a function provided as an alternative to email and solely for official business. The law requiring action is plain; to the extent EPA denies the law's applicability to the requested information, as it has to date defended these practices when uncovered, it may do so but still must provide responsive records.

EPA Owes CEI a Reasonable Search, Which Includes a Non-Conflicted Search

FOIA requires an agency to make a reasonable search of records, judged by the specific facts surrounding each request. *See, e.g., Itrurralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003); *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994).

It is well-settled that Congress, through FOIA, "sought 'to open agency action to the light of public scrutiny.'" *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (*quoting Dep't of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the "'general philosophy of full agency disclosure'" that animates the statute. *Rose*, 425 U.S. at 360 (*quoting* S.Rep. No. 813, 89th Cong., 2nd Sess., 3 (1965)). The act is designed to "pierce the veil of administrative secrecy and to open agency action to the light of

scrutiny." *Department of the Air Force v. Rose*, 425 U.S. 352 (1976). It is a transparency-forcing law, consistent with "the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Id*.

A search must be "reasonably calculated to uncover all relevant documents." *See, e.g., Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). In determining whether or not a search is "reasonable," courts have been mindful of the purpose of FOIA to bring about the broadest possible disclosure. *See Campbell v. DOJ*, 164 F.3d 20, 27 (D.C. Cir. 1999) ("reasonableness" is assessed "consistent with congressional intent tilting the scale in favor of disclosure").

The reasonableness of the search activity is determined ad hoc but there are rules, including that the search must be conducted free from conflict of interest. (In searching for relevant documents, agencies have a duty "to ensure that abuse and conflicts of interest do not occur." *Cuban v. S.E.C.*, 744 F.Supp.2d 60, 72 (D.D.C. 2010). See also *Kempker-Cloyd v. Department of Justice*, No. 97-cv-253, 1999 U.S. Dist. LEXIS 4813, at *12, *24 (W.D. Mich. Mar. 12, 1999) (holding that the purpose of FOIA is defeated if employees can simply assert that records are personal without agency review; faulting Department of Justice for the fact that it "was aware that employee had withheld records as 'personal' but did not require that 'he submit those records for review' by the Department.)).

For these reasons CEI expects expect this search be conducted free from conflict of interest.

Withholding and Redaction

Please identify and inform us of all responsive or potentially responsive records within the statutorily prescribed time, and the basis of any claimed exemptions or privilege and to which specific responsive or potentially responsive record(s) such objection applies.

EPA has informed CEI that the reason that it has no records of Ms. McCarthy's text messages sent or received over a three year period prior to the dates relevant to the instant request is because each of the many thousands of texts were personal and, on that basis, not saved (*see* previously cited correspondence from Department of Justice attorneys on EPA's behalf). That is, the rationale for destroying all among many thousands of text messages is because each of the 5,392-10,000 text messages (approximately, assuming Ms. McCarthy continued texting at the same rate as over the three years for which we have some information) were purely personal (*see* previously cited EPA and DoJ emails; on EPA's behalf DoJ also plainly implied, twice, that Ms. McCarthy only used the texting function on her EPA-issued phone for personal use). As such, if any text message sent to or from this EPA-provided phone or PDA during the two billing periods covered by this request represents purely personal correspondence, please identify that communication and inform us of EPA's position why it will not produce the record, including if the record does not exist. If EPA still cannot identify/has preserved no record of the correspondence since 8/01/2013, then please state so.

If EPA claims any records or portions thereof are exempt under one of FOIA's discretionary exemptions we request you exercise that discretion and release them consistent with statements by the President and Attorney General, *inter alia*, that "**The old rules said that if there was a defensible argument for not disclosing something to the American people,**

then it should not be disclosed. That era is now over, starting today" (President Barack Obama, January 21, 2009), and "**Under the Attorney General's Guidelines, agencies are encouraged to make discretionary releases. Thus, even if an exemption would apply to a record, discretionary disclosures are encouraged**. Such releases are possible for records covered by a number of FOIA exemptions, including Exemptions 2, 5, 7, 8, and 9, but they will be most applicable under Exemption 5." (Department of Justice, Office of Information Policy, OIP Guidance, "Creating a 'New Era of Open Government'").

It is difficult to see how the requested records, sent or received on a device provided by EPA, exclusively for the performance of Agency duties, with extremely limited circumstantial exceptions permitted, could be deemed "private"; that is, that their release would constitute an unwarranted invasion of personal privacy. For the same reasons of context it is further difficult to see how this could entail substantial review time.

Nonetheless, if your office takes the position that any portion of the requested records is exempt from disclosure, please inform us of the basis of any partial denials or redactions. In the event that some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable, non-exempt portions of the requested records. See 5 U.S.C. §552(b).

Further, we request that you provide us with an index of those documents as required under V*aughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1972), with sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA" pursuant to *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959

(D.C. Cir. 1979), and "describ[ing] each document or portion thereof withheld, and for each withholding it must discuss the consequences of supplying the sought-after information." *King v. Department of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987).

We remind EPA it cannot withhold entire documents rather than produce their "factual content" and redact the confidential advice and opinions. As the D.C. Court of Appeals noted, the agency must "describe the factual content of the documents and disclose it or provide an adequate justification for concluding that it is not segregable from the exempt portions of the documents." *Id.* at 254 n.28. As an example of how entire records should not be withheld when there is reasonably segregable information, we note that basic identifying information (who, what, when) is not "deliberative". As the courts have emphasized, "the deliberative process privilege directly protects advice and opinions and *does not permit the nondisclosure of underlying facts* unless they would indirectly reveal the advice, opinions, and evaluations circulated within the agency as part of its decision-making process." *See Mead Data Central v. Department of the Air Force*, 566 F.2d 242, 254 n.28 (D.C. Cir. 1977) (emphasis added).

That means, do not redact the requesting party and the Agency's initial determination, or grounds there-for, in the event that determination was a denial. For example, EPA must cease its ongoing pattern with CEI of over-broad claims of b5 "deliberative process" exemptions to withhold information which is not in fact truly antecedent to the adoption of an Agency policy (*see Jordan v. Do*J, 591 F.2d 753, 774 (D.C. Cir. 1978)), but merely embarrassing or inconvenient to disclose.

If it is your position that a document contains non-exempt segments and that those non-exempt segments are so dispersed throughout the documents as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. *See Mead Data Central v. Department of the Air Force*, 455 F.2d at 261.

Claims of non-segregability must be made with the same practical detail as required for claims of exemption in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

Satisfying this Request contemplates providing copies of documents, in electronic format if you possess them as such, otherwise photocopies are acceptable.

Please provide responsive documents in complete form, with any appendices or attachments as the case may be.

Request for Fee Waiver

This discussion is detailed as a result of our recent experience of agencies, particularly EPA, improperly using denial of fee waivers to impose an economic barrier to access, an improper means of delaying or otherwise denying access to public records, despite our history of regularly obtaining fee waivers. We are not alone in this experience.[16]

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[16] *See* February 21, 2012 letter from public interest or transparency groups to four federal agencies requesting records regarding a newly developed pattern of fee waiver denials and imposition of "exorbitant fees" under FOIA as a barrier to access, available at http://images.politico.com/global/2012/03/aclufffeewvrfoialtr.pdf; *see also National Security Counselors v. CIA* (CV: 12-cv-00284(BAH), filed D.D.C Feb. 22, 2012); *see also* "Groups Protest CIA's Covert Attack on Public Access," OpentheGovernment.org, February 23, 2012, http://www.openthegovernment.org/node/3372.

1) Disclosure would substantially contribute to the public at large's understanding of governmental operations or activities, on a matter of demonstrable public interest

CEI requests waiver or reduction of all costs pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) ("Documents shall be furnished without any charge...if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester"); see also 40 C.F.R. §2.107(l), and (c).

The information sought in this request is not sought for a commercial purpose. Requester is organized and recognized by the Internal Revenue Service as a 501(c)3 educational organization (not a "Religious...Charitable, Scientific, Literary, Testing for Public Safety, to Foster National or International Amateur Sports Competition, or Prevention of Cruelty to Children or Animals Organization[]"). With no possible commercial interest in these records, an assessment of that non-existent interest is not required in any balancing test with the public's interest.

As a non-commercial requester, CEI is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*, 754 F. Supp. 2d 1 (D.D.C. Nov. 30, 2010). Specifically, the public interest fee waiver provision "is to be liberally construed in favor of waivers for noncommercial requesters." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F. 2d 1284, 2184 (9th Cir. 1987).

FOIA is aimed in large part at promoting active oversight roles of watchdog public advocacy groups. "The legislative history of the fee waiver provision reveals that it was added to FOIA 'in an attempt to prevent government agencies from using high fees to discourage certain

types of requesters, and requests,' in particular those from journalists, scholars and nonprofit public interest groups." *Better Government Ass'n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986) (fee waiver intended to benefit public interest watchdogs), citing to *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D.Mass. 1984); SEN. COMM. ON THE JUDICIARY, AMENDING THE FOIA, S. REP. NO. 854, 93rd Cong., 2d Sess. 11-12 (1974)).[17]

Congress enacted FOIA clearly intending that "fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information." *Ettlinger v. FBI*, citing Conf. Comm. Rep., H.R. Rep. No. 1380, 93d Cong., 2d Sess. 8 (1974) at 8. Improper refusal of fees as a means of withholding records from a FOIA requester constitutes improper withholding. *Ettlinger v. FBI*.

Given this, "insofar as ...[agency] guidelines and standards in question act to discourage FOIA requests and to impede access to information for precisely those groups Congress intended to aid by the fee waiver provision, they inflict a continuing hardship on the non-profit public interest groups who depend on FOIA to supply their lifeblood -- information." *Better Gov't v. State* (internal citations omitted). The courts therefore will not permit such application of FOIA requirements that "'chill' the ability and willingness of their organizations to engage in activity

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[17] This was grounded in the recognition that the two plaintiffs in that merged appeal were, like Requester, public interest non-profits that "rely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions." *Better Gov't v. State*. They therefore, like Requester, "routinely make FOIA requests that potentially would not be made absent a fee waiver provision", requiring the court to consider the"Congressional determination that such constraints should not impede the access to information for appellants such as these." *Id*.

that is not only voluntary, but that Congress explicitly wished to encourage." *Id*. As such, agency implementing regulations may not facially or in practice interpret FOIA's fee waiver provision in a way creating a fee barrier for Requester.

"This is in keeping with the statute's purpose, which is 'to remove the roadblocks and technicalities which have been used by . . . agencies to deny waivers.'" *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Educ.*, 593 F. Supp. 261, 268 (D.D.C. 2009), citing to *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th. Cir. 1987)(quoting 132 Cong. Rec. S16496 (Oct. 15, 1986) (statement of Sen. Leahy).

Requester's ability to utilize FOIA -- as well as many nonprofit organizations, educational institutions and news media who will benefit from disclosure -- depends on its ability to obtain fee waivers. For this reason, "Congress explicitly recognized the importance and the difficulty of access to governmental documents for such typically under-funded organizations and individuals when it enacted the 'public benefit' test for FOIA fee waivers. This waiver provision was added to FOIA 'in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,' in a clear reference to requests from journalists, scholars and, most importantly for our purposes, nonprofit public interest groups. Congress made clear its intent that fees should not be utilized to discourage requests or to place obstacles in the way of such disclosure, forbidding the use of fees as '"toll gates" on the public access road to information.'" *Better Gov't Ass'n v. Department of State*.

As the *Better Government* court also recognized, public interest groups employ FOIA for activities "essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go

undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions." That is true in the instant matter as well.

Indeed, recent EPA assertions to undersigned in relation to various recent FOIA requests, both directly and through counsel reflecting its pique over the robustness of said FOIAing efforts (and subsequent, toned-down restatements of this acknowledgement), prove too much in the context of EPA now serially denying fee waiver requests, given that it reaffirms that CEI is precisely the sort of group the courts have identified in establishing this precedent.

Courts have noted FOIA's legislative history to find that a fee waiver request is likely to pass muster "if the information disclosed is new; supports public oversight of agency operations, including the quality of agency activities and the effects of agency policy or regulations on public health or safety; or, otherwise confirms or clarifies data on past or present operations of the government." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1284-1286.

This information request meets that description, for reasons both obvious and specified.

The subject matter of the requested records specifically concerns identifiable operations or activities of the government. The requested records directly relate to high-level promises by the President of the United States and the Attorney General to be "the most transparent administration, ever": is EPA properly maintaining an alternative to electronic mail on devices provided by EPA to senior officials exclusively for the performance of Agency duties, with extremely limited circumstantial exceptions permitted, which class of records has apparently never been produced by EPA in response to FOIA and congressional requests for "records" and/or "electronic records". This promise, in its serial incarnations, demanded and

spawned widespread media coverage, and then of the reality of the administration's transparency efforts, and numerous transparency-oriented groups reporting on this performance, prompting further media and public interest (see, e.g., and internet search of "study Obama transparency").

Particularly after Requester's recent discoveries using FOIA, its publicizing certain EPA record-management and electronic communication practices and CEI's other efforts to disseminate the information, the public, media and congressional oversight bodies are very interested in how widespread are the violations of this pledge of unprecedented transparency.

This request, when satisfied, will further inform this ongoing public discussion.

We emphasize that **a Requester need not demonstrate that the records would contain any particular evidence, such as of misconduct.** Instead, the question is whether the requested information is likely to contribute significantly to public understanding of the operations or activities of the government, period. *See Judicial Watch v. Rosotti*, 326 F. 3d 1309, 1314 (D.C. Cir 2003).

Potentially responsive records reflecting whether or not EPA has maintained and preserved text messages sent and received on Agency devices, provided for EPA work, and using a texting function specifically provided to certain EPA officers and again for EPA work, during periods when EPA has confirmed that the individual whose texting is at issue in this request was particularly active with her texting, and in ways that we are informed led to internal cautions about the propriety of the texts, used unquestionably reflect "identifiable operations or activities of the government."

The Department of Justice Freedom of Information Act Guide expressly concedes that this threshold is easily met. There can be no question that this is such a case.

Disclosure is "likely to contribute" to an understanding of specific government operations or activities because the releasable material will be meaningfully informative in relation to the subject matter of the request. The disclosure of the requested records have an informative value and are "likely to contribute to an understanding of Federal government operations or activities" just as did various studies of public records reflecting on the administration's transparency, returned in the above-cited search "study obama transparency", and the public records themselves that were released to those groups, contributed to public understanding of specific government operations or activities: this issue is of significant and increasing public interest, in large part due to the administration's own promises and continuing claims, and revelations by outside groups accessing public records. To deny this and the substantial media and public interest, across the board from Fox News to PBS and The Atlantic, would be arbitrary and capricious, as would be denial that shedding light on **this heretofore unexplored but important aspect** of the issue would further and significantly inform the public.

However, **the Department of Justice's Freedom of Information Act Guide makes it clear that, in the DoJ's view, the "likely to contribute" determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain.** There is no reasonable claim to deny that, to the extent the requested information is available in the public domain; these are forms obtained and held only by EPA. Further, however, **this aspect of the important public debate, of heretofore never produced text message records and related practices, has yet to be explored**. It is therefore clear that

the requested records are "likely to contribute" to an understanding of your agency's decisions because they are not otherwise accessible other than through a FOIA request.

The disclosure will contribute to the understanding of the public at large, as opposed to the understanding of the requester or a narrow segment of interested persons. CEI intends to post these records for public scrutiny and otherwise to broadly disseminate the information it obtains under this request by the means described, herein. CEI has spent years promoting the public interest advocating sensible policies to protect human health and the environment, routinely receiving fee waivers under FOIA (until recently, but even then on appeal) for its ability to disseminate public information. Further, as demonstrated herein and in the above litany of exemplars of newsworthy FOIA activity, requester and particularly undersigned counsel have an established practice of utilizing FOIA to educate the public, lawmakers and news media about the government's operations and, in particular, have brought to light important information about policies grounded in energy and environmental policy, like EPA's, specifically in recent months relating to transparency and electronic record practices.

Requester intends to disseminate the information gathered by this request via media appearances (the undersigned appears regularly, to discuss his work, on national television and national and local radio shows, and weekly on the radio shows "Garrison" on WIBC Indianapolis and the nationally syndicated "Battle Line with Alan Nathan").

Requester also publishes materials based upon its research via print and electronic media, as well as in newsletters to legislators, education professionals, and other interested parties.[18] For a list of exemplar publications, please see http://cei.org/publications. Those activities are in fulfillment of CEI's mission. We intend to disseminate the information gathered by this request to the public at large and at no cost through one or more of the following: (a) newsletters; (b) opinion pieces in newspapers or magazines; (c) CEI's websites, which receive approximately 150,000 monthly visitors (appx. 125,000 unique)(*See, e.g., www.openmarket.org*, one of several blogs operated by CEI providing daily coverage of legal and regulatory issues, and *www.globalwarming.org* (another CEI blog); (d) in-house publications for public dissemination; (e) other electronic journals, including blogs to which our professionals contribute; (f) local and syndicated radio programs dedicated to discussing public policy; (g) to the extent that Congress or states engaged in relevant oversight or related legislative or judicial activities find that which is received noteworthy, it will become part of the public record on deliberations of the legislative branches of the federal and state governments on the relevant issues.

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[18] *See EPIC v. DOD*, 241 F.Supp.2d 5 (D.D.C. 2003) (court ruled that the publisher of a bi-weekly electronic newsletter qualified as the media, entitling it to a waiver of fees on its FOIA request)*; Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1181-82 (10th Cir. 2005) (fee waiver granted for group that "aims to place the information on the Internet"; "Congress intended the courts to liberally construe the fee waiver requests of noncommercial entities").

CEI also is regularly cited in newspapers,[19] law reviews,[20] and legal and scholarly publications.[21]

More importantly, with a foundational, institutional interest in and reputation for its leading role in the relevant policy debates and expertise in the subject of transparency, energy- and environment-related regulatory policies CEI unquestionably has the "specialized knowledge" and "ability and intention" to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the "public-at-large."

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[19] *See, e.g.,* Al Neuharth, "Why Bail Out Bosses Who Messed It Up," *USA Today*, Nov. 21, 2008, at 23A (quotation from Competitive Enterprise Institute) (available at 2008 WLNR 22235170); Bill Shea, "Agency Looks Beyond Criticism of Ads of GM Boasting About Repaid Loan," *Crain's Detroit Business*, May 17, 2010, at 3 (available at 2010 WLNR 10415253); Mona Charen, Creators Syndicate, "You Might Suppose That President Obama Has His Hands ...," *Bismarck Tribune*, June 10, 2009, at A8 (syndicated columnist quoted CEI's OpenMarket blog); Hal Davis, "Earth's Temperature Is Rising and So Is Debate About It," *Dayton Daily News*, April 22, 2006, at A6 (citing CEI's GlobalWarming.Org); *Washington Examiner*, August 14, 2008, pg. 24, "Think-Tanking" (reprinting relevant commentary from OpenMarket); Mark Landsbaum, "Blogwatch: Biofuel Follies," *Orange County Register*, Nov. 13, 2007 (citing OpenMarket) (available in Westlaw news database at 2007 WLNR 23059349); *Pittsburgh Tribune-Review*, "Best of the Blogs," Oct. 7, 2007 (citing OpenMarket) (available in Westlaw news database at 2007 WLNR 19666326).

[20] *See, e.g.,* Robert Hardaway, "The Great American Housing Bubble," 35 *University of Dayton Law Review* 33, 34 (2009) (quoting Hans Bader of CEI regarding origins of the financial crisis that precipitated the TARP bailout program).

[21] *See, e.g.,* Bruce Yandle, "Bootleggers, Baptists, and the Global Warming Battle," 26 *Harvard Environmental Law Review* 177, 221 & fn. 272 (citing CEI's GlobalWarming.Org); Deepa Badrinarayana, "The Emerging Constitutional Challenge of Climate Change: India in Perspective," 19 *Fordham Environmental Law Review* 1, 22 & fn. 119 (2009) (same); Kim Diana Connolly, "Bridging the Divide: Examining the Role of the Public Trust in Protecting Coastal and Wetland Resources," 15 *Southeastern Environmental Law Journal* 1, 15 & fn. 127 (2006) (same); David Vanderzwaag, *et al.*, "The Arctic Environmental Protection Strategy, Arctic Council, and Multilateral Environmental Initiatives," 30 Denver Journal of International Law and Policy 131, 141 & fn. 79 (2002) (same); Bradley K. Krehely, "Government-Sponsored Enterprise: A Discussion of the Federal Subsidy of Fannie Mae and Freddie Mac, 6 North Carolina Banking Institute 519, 527 (2002) (quoting Competitive Enterprise Institute about potential bailouts in the future).

The disclosure will contribute "significantly" to public understanding of government operations or activities. *We repeat and incorporate here by reference the arguments above from the discussion of how disclosure is "likely to contribute" to an understanding of specific government operations or activities*.

After disclosure of these records, the public's understanding of this unexplored aspect of the now highly controversial claims of executive branch and administration transparency, and this heretofore unexplored but important aspect of the administration's electronic record practices (text message use and retention, and now agency response to evidence of a class of records being destroyed), will inherently be significantly enhanced. The requirement that disclosure must contribute "significantly" to the public understanding is therefore met.

As such, the Requester has stated "with reasonable specificity that its request pertains to operations of the government," and "the informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having explained with reasonable specificity how those documents would increase public knowledge of the functions of government." *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Health and Human Services*, 481 F. Supp. 2d 99, 107-109 (D.D.C. 2006).

2) **Alternately, CEI qualifies as a media organization for purposes of fee waiver**

The provisions for determining whether a requesting party is a representative of the news media, and the "significant public interest" provision, are not mutually exclusive. Again, as CEI is a non-commercial requester, it is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*. Alternately and only in the event EPA deviates from prior practice on similar requests and refuses to waive our

fees under the "significant public interest" test, which we will then appeal while requesting EPA proceed with processing on the grounds that we are a media organization, we request a waiver or limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)("fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by.... a representative of the news media...") and 40 C.F.R. §2.107(d)(1) ("No search or review fees will be charged for requests by educational institutions...or representatives of the news media."); see also 2.107(b)(6).

However, we note that as documents are requested and available electronically, there are no copying costs.

Requester repeats by reference the discussion as to its publishing practices, reach and intentions all in fulfillment of CEI's mission from pages 20-22, *supra*.

The information is of critical importance to the nonprofit policy advocacy groups engaged on these relevant issues, news media covering the issues, and others concerned with Agency activities in this controversial area, or as the Supreme Court once noted, what their government is up to.

For these reasons, Requester qualifies as a "representative[] of the news media" under the statutory definition, because it routinely gathers information of interest to the public, uses editorial skills to turn it into distinct work, and distributes that work to the pubic. *See Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003)(non-profit organization that gathered information and published it in newsletters and otherwise for general distribution qualified as representative of news media for purpose of limiting fees). Courts have reaffirmed that non-profit requesters who are not traditional news media outlets can

qualify as representatives of the new media for purposes of the FOIA, including after the 2007 amendments to FOIA. *See ACLU of Washington v. U.S. Dep't of Justice*, No. C09-0642RSL, 2011, 2011 U.S. Dist. LEXIS 26047 at *32 (W.D. Wash. Mar. 10, 2011). *See also Serv. Women's Action Network v. DOD*, 2012 U.S. Dist. Lexis 45292 (D. Conn., Mar. 30, 2012).

Accordingly, any fees charged must be limited to duplication costs. The records requested are available electronically and are requested in electronic format; as such, there are no duplication costs other than the cost of a compact disc(s).

CONCLUSION

We expect the agency to release within the statutory period of time all segregable portions of responsive records containing properly exempt information, and to provide information that may be withheld under FOIA's discretionary provisions and otherwise proceed with a bias toward disclosure, consistent with the law's clear intent, judicial precedent affirming this bias, and President Obama's directive to all federal agencies on January 26, 2009. Memo to the Heads of Exec. Offices and Agencies, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009) ("The Freedom of Information Act should be administered with a clear presumption: in the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, or because of speculative or abstract fears).

We expect this all aspects of this request be processed free from conflict of interest and the response, if it is 'no records', to offer some justification to explain such a claim when EPA's own records have demonstrated that hundreds of these messages were in fact created.

We request the agency provide particularized assurance that it is reviewing some quantity of records with an eye toward production on some estimated schedule, so as to establish some reasonable belief that it is processing our request. 5 U.S.C.A. § 552(a)(6)(A)(i). EPA must at least to inform us of the scope of potentially responsive records, including the scope of the records it plans to produce and the scope of documents that it plans to withhold under any FOIA exemptions; FOIA specifically requires EPA to immediately notify CEI with a particularized and substantive determination, and of its determination and its reasoning, as well as CEI's right to appeal; further, FOIA's unusual circumstances safety valve to extend time to make a determination, and its exceptional circumstances safety valve providing additional time for a diligent agency to complete its review of records, indicate that responsive documents must be collected, examined, and reviewed in order to constitute a determination. *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, --- F.3d ----, 2013 WL 1296289 (C.A.D.C.), April 2, 2013. See also; *Muttitt v. U.S. Central Command*, 813 F. Supp. 2d 221; 2011 U.S. Dist. LEXIS 110396 at *14 (D.D.C. Sept. 28, 2011)(addressing "the statutory requirement that [agencies] provide estimated dates of completion").

We request a rolling production of records, such that the agency furnishes records to my attention as soon as they are identified, preferably electronically, but as needed then to my attention, at the address below.

If you have any questions please do not hesitate to contact me.

Respectfully submitted,

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